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CURRENT TOPICS

The Air Corporations and Limitation of Actions

AMONG the Acts which received the Royal Assent on 18th December last, the Air Corporations Act, 1953, deserves the attention of solicitors by reason of the provisions of s. 3. This section enacts that the Public Authorities Protection Act, 1893, and s. 21 of the Limitation Act, 1939, shall not apply to actions against the British Overseas Airways Corporation or the British European Airways Corporation or their respective servants or agents as such, and that in respect of such actions ss. 2 and 3 of the 1939 Act shall apply with the substitution of the period of three years for the period of six years mentioned in those sections. The air corporations are thus belatedly brought into line with the other nationalised undertakings in enjoying a three-year period of limitation as respects actions of contract and tort; but it may be remarked that if the Law Reform (Limitation of Actions, etc.) Bill now before Parliament becomes law, the anomalous position of all these bodies will disappear, since that Bill proposes to abolish the existing discrimination in favour of public authorities by repealing the special provisions in the Nationalisation Acts as well as the Act of 1893 and s. 21 of the Act of 1939. Presumably an amendment will now be moved to repeal also s. 3 of the 1953 Act.

Figures in Affidavits

As a supplement to a recent statement by WYNN PARRY, J., on Chancery practice with regard to figures on affidavits (97 SOL. J. 838), HARMAN, J., stated during the hearing of an originating summons on 17th December: "There is a direction in the White Book that figures and dates in affidavits should be expressed not in words but in figures. My predecessor, Mr. Justice P. O. Lawrence, used to make solicitors pay personally the costs of any affidavits not complying with that direction. Be it known that, hereafter, the masters, on the preliminary hearing of adjourned summonses, will have authority to visit any substantial infraction of this direction by ordering that the affidavit be taken off the file and resworn at the expense of the solicitor who files it."

Licences for Private House Builders

FOLLOWING the announcement by the Minister of Works in the House of Commons on 30th November that further freedom can now be given to builders of private houses without detriment to local authorities' programmes, the Minister of Housing and Local Government has sent a circular (No. 69/53) to housing authorities giving details of the new arrangements in force from the beginning of 1954. As from 1st January, the size of houses for which a licence will automatically be granted by a local authority is raised from 1,000 sq. ft. to 1,500 sq. ft. Builders will be issued automatically with licences to build up to fifty houses of not more than 1,500 sq. ft. at a time instead of the present limit of twelve houses of not more than 1,000 sq. ft. Local authorities are told that applications to build houses between 1,500 and 2,500 sq. ft. should be considered on their merits, with due regard to the locality of the site, to any restrictive covenants, and to the family or other special needs of the applicant. Any application for a licence

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to build a house larger than 2,500 sq. ft. or for a block licence for over fifty houses will be submitted by the local authority to the Ministry's Principal Regional Officer, with the council's comments and recommendations, after any outstanding question on planning and byelaw consent has been cleared. The conditions under which both kinds of licences will be issued and some other considerations to be taken into account are set out in the appendix to the circular. As stated in circular 60/53, the Government has decided not to extend the provisions of the Building Materials and Housing Act, 1945, as amended, and consequently no conditions of any description governing the right of sale or letting of houses built under licence should be imposed. Among the appended conditions are: houses may be built for letting or for sale; the plans and outline specification should be approved by the local authority; there are circumstances in which it will be proper and desirable to issue a supplementary licence; applicants for licences should be ready to start building within a reasonable period.

The International Court

THE President of the International Arbitration League, LORD AMMON, has addressed an appeal, in a letter to *The Times* of 21st December, 1953, supported by LORD LAYTON and the Chairman of the League, Mr. GEORGE BRYANS, which should meet a ready response from lawyers. He asked for help, financial and otherwise, for a campaign, which will open in the New Year, to extend the work of the International Court of Justice at The Hague to comprehend, *inter alia*, the hearing of claims under the European Convention of Human Rights. He recalled that Sir Randal Cremer handed over to the League, which he founded, the Nobel Peace Prize which he won fifty years ago, and contended that "with his passion for international justice, he would not have ceased to agitate until this omission had been rectified." Eminent men and women of all nationalities and of various political, ethical and religious persuasions will be brought together as was done in Cremer's day. An international conference is to be held in London in the spring, and a dinner is to be given in the House of Lords, to celebrate the Cremer jubilee. A further meeting is to take place at The Hague. A great conception in international affairs has now become a familiar and indispensable part of the law of the world, and as Mr. SELWYN LLOYD, the Minister of State, emphasised at the Cremer celebration luncheon at the House of Commons on 5th May, "as long as international courts are not used to the fullest extent, there remains work for such organisations as the League to perform."

SPECIAL AGENTS IN TORT

THE tag "*Respondeat Superior*" seems to have started its career in the law as the name of an aid to execution enacted in the Second Statute of Westminster. Later it came to have a more general application in regard to employer's liability. It is a tenable view that yet another change has come over it in the past fourteen years. In its basic form it means, in the law of tort, that a master is liable to a third party for the tortious acts of his servant committed in the course of the servant's duty. To interpret it correctly one must not, of course, regard the terms "servant" and "duty" too narrowly. The "superior" in the maxim need never have been in the position of a master for general purposes. What modern cases are tending to emphasise, if we read them aright, is that if the proposition we have stated is to be regarded as comprehensive of the circumstances in which a person may be held vicariously responsible in tort, it is necessary to put a wholly artificial and indeed strained construction on the word "servant," and to substitute for the old-fashioned inquiry into the course of "duty" a form of test not especially relevant to the ordinary relationship of master and servant. A recent extreme example in the Mayor's and City of London Court (*Owners of The Thelma* v. *Owners of The Endymion* (1953), *The Times*, 11th November) gives especial topicality to the subject. [We have been furnished with a copy of the judgment in this case, from which we shall presently quote.]

Text-books on tort tend to deal with the whole subject of vicarious liability on the basis that if *A*, using *B's* chattel or fulfilling his mandate, injures *C*, *B* is liable to *C* if *A* was *B's* servant acting at the time within the scope of his employment, and (with certain exceptions not relevant here) not so liable if *A* was an "independent contractor." For "servant" we must read "servant or agent"; common form pleadings in running-down actions use these words interchangeably, aided and abetted by the editors of Salmond who describe the distinction as, for this purpose, unimportant. "All agents are either servants or independent contractors . . . Agency in contract differs from agency in the law of torts." Well and good so long as we understand. All that is needed is a criterion for distinguishing those agents who are servants from those who are independent contractors. Salmond explains that this distinction is one between a contract of service and contract for services, and turns on the right to control the way the job is done. The time has possibly come to recategorise at least those executants of tortious acts whose delict involves the use of another's chattel, and to separate them into agents and mere bailees. Those of the former class fix their principals with vicarious liability, for the agency is for the principal's benefit or purpose; the latter are solely responsible for the misuse of the chattel which they have borrowed for their own purposes.

It was du Parcq, L.J., in *Hewitt* v. *Bonvin* [1940] 1 K.B. 188 who first clearly favoured the analogy of agency rather than the more blatant fiction of a master and servant relationship in classifying those cases where no suggestion either of a contractual agency or of a *de facto* employment could be read into the situation. Such cases had existed in the reports certainly since 1837, and, typically, one of the earliest was concerned with vehicular traffic. In *Wheatley* v. *Patrick* (1837), 2 M. & W. 650, the plaintiff had alleged negligent and improper driving *by the defendant* of a horse and chaise. One can even now sense the relish with which the defendant and his advisers, biding their time, contemplated the forthcoming trial, at which they would adduce the devastating piece of evidence that not the defendant but a friend of his had been driving the chaise at the material time. Nevertheless, the defendant had taken the hire of the horse and vehicle for the day and was sitting in the gig at the time. The court held that, the defendant being present, having the actual control and permitting another to drive, it could be charged that he was actually driving. Equally, said Lord Abinger, it might have been alleged against him that the friend by his consent had driven improperly. The plaintiff recovered against him.

Consent, however, would not alone have been sufficient to render Mr. Patrick liable. So much appears from the decision in *Hewitt* v. *Bonvin*, where a son had borrowed with consent his father's car to take home his own friends. The father was held not responsible for the son's negligent driving. It

was a case, indeed, of the loan of a chattel for the borrower's purposes. Neither service nor agency entered into it. But both MacKinnon and du Parcq, L.JJ., discussed the law generally, the former on the old basis of master and servant, making even an obliging friend into a temporary servant, the latter examining some earlier cases with, as we have said, a predilection for an analogy with the law of agency. To make good such an analogy one must look not only for consent, nor for control over the manner of doing the service, but for the essential purpose of the transaction. "The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive *on the owner's behalf*," said du Parcq, L.J. We have introduced the italics to show the significant phrase in the light of later cases, but first let us mention shortly the previous authorities on which the statement is founded. Besides *Wheatley* v. *Patrick* ("there could hardly be a better illustration of the maxim *qui facit per alium facit per se*") there was the Privy Council decision in *Samson* v. *Aitchison* [1912] A.C. 844, in announcing which Lord Atkinson emphasised that it is the retention of control by the car owner over another person whom he allows, in his presence, to drive his car which saddles the owner with responsibility. But what if the owner is elsewhere? Then the test cannot be physical control. Consistently with the master and servant fiction it has usually been taken to be the right to control. *Parker* v. *Miller* (1926), 42 T.L.R. 408, raised the very issue, and notwithstanding that he refers to agency, Scrutton, L.J., so far as his remarks are reported, puts the test as the right of control. But du Parcq, L.J., not only interpreted *Parker* v. *Miller* as an example of agency contradistinguished from bailment. He completed what we would submit is the appropriate logical process by postulating not any criterion of control, but the delegation by the owner to the driver of a task to be performed with the car—a much more natural incident of an informal agency.

When Denning, L.J., in *Ormrod* v. *Crosville Motor Services, Ltd.* [1953] 1 W.L.R. 1120; 97 SOL. J. 570, came to distinguish the decision in *Hewitt* v. *Bonvin* he took the bull very firmly by the horns. He declared that it is not correct to suppose that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. The owner is also liable if the driver is his agent. His lordship then explained the term agent in the context in a way which, with respect, seems to us likely to furnish a much more convenient touchstone to the true legal effect of double-edged fact than the unreal question of authority to control. The learned lord justice said that the driver is to be regarded as the owner's agent if he is driving with the owner's consent on the owner's business or for the owner's purposes. Singleton, L.J., makes it clear that it is sufficient if the purpose in mind is only partly that of the owner, and indeed the facts of the case required that small extension if the owner's liability was to be established in the circumstances.

The owner found himself engaged in the Monte Carlo motor rally, but not in his Healey car which was the one involved in the case. He had, however, arranged to spend a holiday with a friend and his wife in the Healey car, and an arrangement was made that the friend should drive the Healey car from Birkenhead to Monte Carlo in readiness for the holiday, and should take a suitcase of the owner's. On the way it was to be permissible for the friend to make a detour to Bayeux, and with this in mind the friend started on the journey a few days earlier than he need otherwise have done. He got no farther than Chester, on the direct road for the channel crossing, when in thick fog a collision took place which, as the trial judge held, was due to his own negligence. The report concerns the question of the owner's vicarious liability for his friend's negligent driving.

Devlin, J., after hearing legal argument, went straight to the reference to agency in the judgment of du Parcq, L.J., in *Hewitt* v. *Bonvin*. It was not necessary, he thought, to show a legal contract of agency. The case could be described as one where there was a social or moral obligation to drive the owner's car. The owner had requested the friend to drive the car and had an interest in the friend doing so. The Court of Appeal agreed that this was sufficient to fix the owner with liability. The proposed diversion, at the friend's own instance, to Bayeux and the consequent early start (but for which the car would not have been on the road at the material time) were not sufficient to prevent this result for, said Denning, L.J., the trip to Monte Carlo must be considered as a whole, including the proposed excursion to Normandy.

It was upon the *Ormrod* decision that His Honour Judge Ralph Thomas founded himself in the recent Mayor's Court case, which was novel in at least two respects. It concerned not road vehicles but river traffic, and the navigator who was held to be the agent within the relevant special sense of the owners of the offending vessel was none other than the 16-year-old schoolboy cox of a rowing eight belonging to a school. The occasion was the Kingston Amateur Regatta in July, 1952, and the school eight had been entered for one of the events. During a practice start the eight collided with a launch carrying the school coach and other passengers, a collision for which, on a careful review of the facts and allegations of negligence, the learned judge apportioned the blame as to three-quarters to the cox and as to one-quarter to the master of the launch. Now the action was an action *in rem* brought under the court's Admiralty jurisdiction. When he came to deal with the law, therefore, Judge Thomas was able to put his judgment on alternative grounds. He did so in the following sentence: "Whether or not there is a presumption of liability *prima facie*, because this is an action *in rem*, or because the defendants are the owners of the eight, I am quite satisfied, on the evidence, that the cox was the agent of the defendants." The defendants were the school authorities, a statutory corporation, who had entered appearance to the action as owners of the vessel, the *res*.

The learned judge went on to furnish grounds for his finding of agency in these terms: "The eight was the property of the school governors, and it was used by them for their purposes, that is to say, for the training of the boys, and also for the purpose of being entered in races on the river in regattas or otherwise; and no doubt the objects of that were to give an incentive to the boys to do their best at rowing and also, with a hope of winning, to enhance the prestige of the school and perhaps induce parents to send their sons there." It followed that on the occasion in question the cox was using the eight with the defendants' authority, partly at any rate for their purposes and benefit, and within the scope of his agency. Judge Thomas could not distinguish the case from *Ormrod's*.

Nearly twenty years ago McCardie, J., described the principle of *Respondeat Superior* as far-reaching (*Performing Right Society* v. *Palais de Danse* [1924] 1 K.B. 762). What we suggest here with the support of the cases we have cited is that the principle has reached a stage when its usefulness as a signpost to tortious liability demands a definition of "superior" perhaps wider than, certainly different from, that adopted in the older authorities and in the standard text-books.

J. F. J.

A Conveyancer's Diary

1953

FOR the conveyancer, the past year has been most uneventful. Compared with the spate of statutes to which we became accustomed in the five or six years immediately after the war, the legislative programme of the government during 1953 was modest, and of the statutes passed only two can be said to concern the property lawyer directly. The Navy and Marines (Wills) Act, 1953, did a little tidying up in a rather dirty corner of the law, but useful as reforms of this kind are, it is unlikely that the average practitioner will ever have to consult this measure. The Town and Country Planning Act, 1953, is a different matter. One of its aims is to prevent, so far as it is practicable, the future separating of the ownership, respectively, of the right to receive a payment for loss of development value and of the land to which the right relates. This directly affects conveyancing practice, which must now conform to the requirements of the Act. The remaining provisions of the Act are mainly financial, and while they are of great interest and importance to owners of real property and must thus be kept constantly in mind when advice has to be given, they have no direct effect on practice. The large body of suggested forms and precedents which made its appearance on the coming into operation of the Town and Country Planning Act, 1947, has had no parallel in the past year on the occasion of the passing of the Act of 1953.

Otherwise, so far as statute law in 1953 is concerned, one has to some extent to glance backwards. The Intestates' Estates Act, 1952, came into operation on the 1st January, 1953, and a year's experience of its working seems to show that the reforms which it introduced were soundly framed. A good test of the efficiency of a measure of this kind is the absence, or virtual absence, of serious queries on it, and by this test even the wholly new provisions of this Act, those relating to the devolution on the death of a spouse of the matrimonial home, have worked well.

But perhaps the most important event, legislatively speaking, of the past year has been the lapse of s. 7 of the Building Materials and Housing Act, 1945. Originally enacted for a period of four years from the 20th December, 1945, it was prolonged in its period of operation and extended in its scope by the Housing Act, 1949. During its relatively short life this section gave a lot of trouble to the practitioner, largely because the housing shortage which was the occasion of its passing tempted purchasers to disregard the prohibitions which it contained against the payment of excessive prices and rents, so that a number of purchasers of new houses started off with an illegality on the title which it was not always easy to deal with when the time came for a resale. Conveyancers will shed no tears over its demise.

Reported decisions of first class importance have also been few. One's choice in this respect is inevitably influenced by personal preference, and that in its turn depends largely on the individual's practice and experience. In selecting *Re Merton* [1953] 1 W.L.R. 1096; 97 SOL. J. 572, and *Re Greaves* [1953] 3 W.L.R. 987; 97 SOL. J. 832, I give full weight to these factors, but discussion with colleagues in Lincoln's Inn indicates that this choice is not entirely idiosyncratic. Both these cases concerned attempts to rearrange the beneficial interests in trust funds with the object of reducing the amount of estate duty which would have been payable on the death of a person entitled to a life interest in the fund if matters had been allowed to remain as they were. This is one of the besetting problems of the present day for the property lawyer, and the decision in *Re Merton* was welcomed when it was first reported because it seemed to afford an additional method of solving this problem where the trust fund is subject, amongst other provisions, to a special power of appointment. These two decisions formed the subject-matter of an article in this journal only a week or two ago (see 97 SOL. J. 869), and I need not, therefore, linger over them now; but I would like to express my agreement with the view of the writer of that article, that the point of distinction which the court was able to find between the facts in *Re Greaves* and those in the earlier case of *Re Merton* seems to be a little unreal. The course of conduct open to a person who is at once the life tenant of, and the person entrusted with a power of appointment over, a fund in relation to schemes designed to mitigate the effect of taxation on the interests of all the persons entitled to the fund is such an important question nowadays, that a reference of the difficulty of reconciling *Re Greaves* with some at least of the earlier decisions on this subject to a court capable of resolving this difficulty cannot be regarded as unlikely. In the meantime practitioners with problems involving this difficulty on their hands may be well advised, if time permits, to delay a final opinion, unless of course the size of the fund in question is sufficient to merit an application to the Court of Appeal.

Allied to these cases, because the basic problem is the same in all, are *Re Downshire Settled Estates* and the two cases heard at the same time, *Re Chapman's Settled Estates* and *Re Blackwell's Settlement Trusts* [1953] 2 W.L.R. 94, 97 SOL. J. 29. The decision of the House of Lords in the *Chapman* case is at present awaited, and until that is known little good can come of any general discussion of these cases. But they have been much considered and discussed in the past year in connection with particular schemes on similar lines.

The report of Lord Nathan's committee on the law and practice relating to charitable trusts was published in 1952, but so late that serious discussion of it took place only in the year under review. It is, therefore, perhaps legitimate to mention it here. The most notable feature of that report was the inability which is there recorded of the committee to agree to a new definition, to replace that based on the statute 43 Eliz. I, c. 4, and its analogies, of the essentials of a valid charitable trust. The famous classification of Lord Macnaghten in *Income Tax Special Commissioners* v. *Pemsel* [1891] A.C. 531, 583, is of least assistance where most is usually wanted, in determining the charitability of trusts other than those for the relief of poverty, the advancement of education, or the advancement of religion, and is in any case too firmly based (how could it be otherwise ?) on the old case law to provide the new start which many lawyers would like to see in this branch of the law. As Lord MacDermott said in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297, 319: "It is a long way to the age of Elizabeth [the First] and I think what is needed is a fresh start from a new statute."

The common law of Scotland on this subject is, I believe, less obfuscated by minute distinctions than ours, and it would be interesting to have a comparative analysis of the two laws by someone qualified to undertake the task. I say "common law" here advisedly, because for fiscal purposes the law which the Scottish courts have to apply in determining whether a given purpose is charitable or not is that of England, case law and all. This rule led to an amusing result in *I.R.C.* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380; 97 SOL. J. 208, where the Special Commissioners found that the respondent association were a charity, and the Court of Session

on the principle that a question of foreign law is a question of fact to be decided on the evidence, refused to disturb this finding of fact of the Commissioners. This delightfully logical decision did not, unfortunately, appeal to the House of Lords.

But perhaps the most important event for the conveyancer in 1953 was something which was not a matter of statute law or case law, but which the legal profession or a section of it has done for itself without the assistance of the Judiciary or the Legislature. For many years now the number and the complexity of the inquiries which a purchaser's solicitor has been accustomed to make as a preliminary to contract have been increasing, and with this increase the period of time which normally elapses between an agreement to purchase "subject to contract" and the exchange of contracts has lengthened enormously. As a result the opportunities for one or other of the parties to resile from the transaction because he has repented of his bargain have also increased, to the detriment of the other party, who may be damaged by such conduct without any hope of effective redress. The new editions of The Law Society's and the National Conditions of Sale, which appeared in the summer of 1953 and which were fully described in several articles in this journal at the time, have provided a remedy for this state of affairs if the parties are minded to adopt it. It is the vendor who is the more usual sufferer under what may now be called the old system of exchange of contracts only after preliminary inquiries, and it would be interesting to know whether attempts by vendors to use the new machinery have met with much resistance from purchasers. Perhaps it is too early yet to appraise the success or failure of this experiment, but the fact that it has been made is of itself worthy of note as indicating the desire of the practitioner of to-day to take every opportunity of improving the means at his disposal for the efficient transaction of his client's affairs.

"A B C"

Landlord and Tenant Notebook

MOVABLE BUILDINGS AS CHATTELS

It does not often happen that someone builds a house on land in which he has no interest whatever; hence, a vast majority of the cases illustrating the *quicquid plantatur solo, solo cedit* maxim have been supplied by the law of landlord and tenant in connection with fixtures. One of the most useful authorities showing the modern trend in that branch of the law was, it is true, a decision between the devisee of a tenant in fee and a legatee of chattels—*Leigh* v. *Taylor* [1902] A.C. 157 (tapestries being the subject-matter)—in which Lord Macnaghten emphasised the point that mode of annexation was only one circumstance to be considered, and was not necessarily the most important circumstance. The decision has been applied in landlord-and-tenant cases, e.g., in *Spyer* v. *Phillipson* [1931] 2 Ch. 183 (C.A.), in which the fact that the tenant of a flat, the lease being for twenty-one years, attached the object in order the better to enjoy the object itself (antique panelling), weighed heavily in his favour. More often, however, we find that other branches of the law resort to landlord-and-tenant decisions when such questions arise; in *Jordan* v. *May* [1947] K.B. 427, while the action was dilapidations against a tenant, the issue turned on the question whether certain storage batteries were fixtures, and therefore land, within the meaning of the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1), the premises having been requisitioned. Some five landlord-and-tenant cases were cited in the course of argument in that case, many stressing the "better use as a chattel" factor; and similar authorities were recently invoked in quite a different proceeding, namely, a criminal prosecution.

In the recent case, *Billing* v. *Pill* [1953] 3 W.L.R. 758; 97 Sol. J. 764, a divisional court considered the following facts found by Cornish justices. During World War II, the War Office placed a number of huts, some with and some without doors and windows, on a gun emplacement site in Cornwall. They were bolted to a concrete base. These huts were vacated in 1946 but the Department retained control, though for some reason or other it was the Ministry of Health who requested the rural district council to eject and deter squatters in the period 1947–1952. In May or June, 1951, the appellant, by two of his servants, demolished one of the doorless, windowless huts, removed seven sections thereof, and re-erected it on his own land. There was no abandonment of possession, though the operation took three days (and the actual charge was that "between 1st January, 1951 and 31st October, 1952 . . .").

The question raised was whether proviso (*a*) to the Larceny Act, 1916, s. 1 (3), applied to that hut. The section defines larceny at some length; the third subsection states, somewhat sweepingly, that everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, is capable of being stolen; proviso (*a*) runs: " . . . save that as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs it from the realty, unless after severance he has abandoned possession thereof."

The magistrates convicted the appellant, being of the opinion that the hutted camp was a temporary camp, the huts movable buildings which did not form part of the realty, the hut in question a purely temporary structure capable of being stolen; and the divisional court took substantially the same view, emphasising the "temporary."

Presumably the case sought to be made to the Bench was that the hut had "formed part of the realty"; for the opinion does not expressly negative the alternative "attached to the realty" which, one would have thought, would have given the accused more scope in the circumstances. The divisional court, however, gave some attention to both possibilities, Goddard, L.C.J., observing: "Those words 'anything attached to or forming part of the realty' might be read as meaning 'attached so as to form part.' It seems odd that a thing can be attached to the realty and yet not form part of it. If it is attached to the realty and may form part thereof, we have to consider whether it is attached to the realty in the sense in which those words are used in this subsection."

The last sentence, I suggest, modifies the one which precedes it; for literally speaking, it must be quite common for something to be attached to realty without forming part of the realty. As the case dealt with an army hut, perhaps the aptest example would be that of "pin-ups." But Lord Goddard's statement does imply agreement with the views stated in *Bain* v. *Brand* (1876), 1 App. Cas. 762, that a fixture, even if it be removable as between landlord and tenant during the term, is part of the freehold while unsevered; it is realty

which may re-acquire lost chattel nature, and not a chattel which may become realty. Hence, while liberal interpretation is, in the case of criminal enactments, unusual, one must agree that it would be absurd to suggest that the proviso conferred exemption whenever the subject-matter happened to be attached to land or to a building.

The only authorities actually cited in the judgment were *Elwes* v. *Maw* (1802), 3 East 38, and *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328 (though the allusions to tapestries and ornamental chimney-pieces suggest that those mentioned in my opening paragraph must have been referred to in argument). *Elwes* v. *Maw* is, perhaps, chiefly known as having stated the pre-Agricultural Holdings Acts disadvantage under which tenant farmers laboured, as compared with tenants of business premises; it was held that a farmer who had built a considerable number of agricultural buildings during his twenty-one-year lease was not entitled to remove them, and Lord Ellenborough's judgment in favour of the landlord, which examines the law of removability at length, was essentially based on the proposition that the exceptions recognised in the cases of necessary and useful erections for the benefit of trade or manufacture did not apply to those added for the purposes of agriculture. An example of some object bolted to the floor would have been afforded by *Crossley Bros., Ltd.* v. *Lee* [1908] 1 K.B. 86, in which a hired gas engine, affixed to a floor by bolts and screws, was held to be distrainable. In my respectful submission, it is not altogether easy to reconcile *Billing* v. *Pill* with this authority when one is fully conscious of the "use as a chattel" element; but different views can, of course, be taken of "temporary" and its importance; as Goddard, L.C.J., put it, the hut was put there merely for a temporary purpose so that soldiers, who were going there for a presumed temporary purpose to man a gun emplacement during the war, would have somewhere to sleep; and the learned lord chief justice compared such an object with a garden seat secured to the ground by a spike so as to prevent it from being blown over. No doubt Goddard, L.C.J., would contrast rather than compare the drawbridge recently reported to have been "stolen" in France, purpose being looked at as at the date of the affixing; the alleged thief, I may mention, is said to have stolen the object because of the value of the zinc it contained, and not to have intended to attach it to a castle of his own.

As might be expected, rent control legislation, both that affecting unfurnished and that affecting furnished lettings, has given rise to realty or chattel problems though, so far, only at county court or rent tribunal level. In a rent tribunal case reported in the *Justice of the Peace* for 8th February, 1947 (113 J.P. News. 376) the rent tribunal for the greater part of Somerset was asked to approve or reduce the "rent" payable under a contract under which the applicant occupied, as a furnished dwelling, a stable at the end of a garden plus a caravan in the garden, the one being used as kitchen and living-room and the other (which had an electric fire installed) as bedroom; the tribunal decided that the contract was one conferring the right to occupy as a residence a house or part of a house. In *Morgan* v. *Taylor* (1948), 99 L.J. News. 290, the Birmingham County Court was called upon to consider whether the "tenant" of a caravan, on wheels mounted on bricks, and including a "verandah" attached to the body of the vehicle by nails, was entitled to the protection of the Rent Acts and decided that as the vehicle (verandah and all) could be easily towed away it was not a dwelling-house to which those Acts applied. The learned county court judge was partly influenced by the consideration that such caravans are not usually rated. But, by way of illustrating the point that there are occasions on which the owner of a caravan may have it both ways, I would refer in conclusion to the recent case of *Baker* v. *Baker* [1953] 3 W.L.R. 857; 97 SOL. J. 798, though admittedly it had nothing to do with the law of landlord and tenant and the decision in no way depended on the particular facts to be mentioned. These are that the respondent, a married woman who had withdrawn from the matrimonial home in circumstances held to amount to constructive desertion by her husband, then developed constructive ideas of her own and withdrew the said home from the said husband; which she would not have been able to do if it had not been a movable building, to wit, a caravan.

R. B.

HERE AND THERE

BURLESQUE INTERLUDE

I SOMETIMES wonder why I don't fill up this column quite simply by copying out whacking great chunks of official pronouncements, for the things that politicians and officials say and write are far funnier than any normal man's inventions. I'm going to try it to-day with a few choice excerpts from Hansard, reporting the proceedings on 16th December, when the House of Commons spent twenty minutes (and it has been computed that Parliamentary time costs I forget how many hundreds of pounds a minute) mainly discussing the age of a lady barrister. Without going into the rights or wrongs (if any) of the matter, one can say that the question arose out of her appointment as chairman of the Hammersmith Rent Tribunal in succession to a gentleman not legally qualified. The dialogue between Mr. G. Rogers, M.P., and Mr. Ernest Marples, Parliamentary Secretary to the Minister of Housing and Local Government, is far funnier than anything I've ever heard on a T.V. programme. Now read on: *R*: "I cannot understand why the Minister dismissed . . . an ex-serviceman, fifty-three years of age, and put in his place a lady of about the same age as Lord Beveridge whom the Minister dismissed for being too old." *M*: "What age is that?" *R*: "About seventy." *M*: "The hon. gentleman says the lady is seventy. Is that a fact?" *R*: "I said that I have been so informed. I have not met the lady and I am putting it forward as the most accurate information which has been supplied to me by those who should know. Does the Minister question the accuracy of that statement? Does he say that she is twenty or thirty years younger?" *M*: ". . . The hon. gentleman is making accusations and allegations. He may or may not be right. I am trying to ascertain what allegation he is making. Is she seventy? It is up to the hon. gentleman to say what he thinks." *R*: "The Minister does not seem to know her age. I am informed that the lady's age is seventy." And so on to the climax of the Parliamentary Secretary's reply: "The hon. gentleman, knowing the opposite sex far better than I do, would not expect me to give the lady's age away, but . . . the hon. gentleman was about 10 per cent. wrong about her age and in the wrong direction. So he was completely wrong . . . The person who was replaced at Hammersmith as chairman was not legally qualified. He tried to qualify and he studied law, but unfortunately the examiners had not the same high opinion of his abilities as the person himself. He had been replaced by someone who had succeeded in the examination." With dialogues like that, is it a wonder that Hansard has so many friends?

FRIEND IN NEED?

LAST year a friend of mine was sent to prison. At the time I was very sorry, for he had great charm, an excellent fighting record in the war and a nice wife. Without going into details, it is enough to say that he had overstrained his resources in some real property deals and had jumped a few legal formalities. But now the latest news of his condition is making me wonder quite seriously whether my sympathy has not been misplaced and whether I ought not to go in for a little self pity instead. To begin with, he was sent to one of the show-place prisons (or, I suppose, any minute now we'll be told to call them "retention centres"), and there the first concern, as in the most enlightened educational establishments, was to find out what he really wanted to do. Real estate having let him down, he felt that commercial art and advertising might suit his talents and personality better. Very well, then, that is what he should do. But there was no room large enough for him to work in. That was all right. His previous experience had given him an expert knowledge of house conversion and he was allowed to knock two rooms into one. He needed an assistant. A charming Wing Commander, also with an excellent fighting record, was associated with him, a far more congenial companion than the squalidly hard-bitten business types who had formed the bulk of his contacts in the real property world. Now with the most up-to-date lighting, the most expensive materials and a blazing fire for comfort, he is learning in ideal conditions of concentration and encouragement something which I myself would dearly like to study, but which I have never been able to afford to tackle. The only interruption is the constant stream of admiring visitors, for the institution is, as I said, a show place and he is one of the show pieces. In the latest authentic account of him, he is described as appearing as if he were going to the Royal Academy with a portfolio of accomplished drawings on the best and most expensive paper.

MY TURN NEXT?

Now, what do you say to that? In the old days, we often heard of the tramps who used to lob a brick through a shop window in order to get a comfortable prison Christmas, and we used to say, "What a shame to society that a man must commit a crime to get a Christmas dinner." But isn't it interesting that the same principle now applies so much higher up the social scale? Obviously I don't want to see my friend put on the treadmill. Obviously it would be a monstrous waste if he were. Obviously it will be better for everyone who knows him if he comes out a talented and successful artist than if he emerged a broken wreck, fit only for emigration and maybe an export reject at that. But isn't it a remarkable state of affairs? You and I toil and wear ourselves out in the service of the law and of our private obligations. Time and money melt at our touch. We cannot save for the coming night when we can no longer work, let alone launch out into those new adventures that are our secret desire for ever unfulfilled. Enormous chunks of our earnings are confiscated by the State for the benefit (*inter alios*) of those who do not act as we do. Sooner or later a time will come when we shall regard those payments as made to a sort of social rehabilitation insurance scheme, and when we feel that we have paid in about enough we shall suddenly let go, compete for a prison entrance examination and make our dreams come true. There are so many technicalities that one can go to prison for nowadays that those of us who are at all squeamish need not even violate the moral law.

RICHARD ROE.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Appeals from Taxing Masters

Sir,—The "Current Topic" under the above heading on p. 822 in your issue of the 5th December rightly states that the decision of a taxing master on quantum is, generally speaking, final. But we doubt whether it is generally appreciated that (1) the basis of taxation is the provision of a reasonable indemnity to a successful party and, therefore, the disallowance of a specially large fee or refresher paid to a particularly fashionable counsel should not be regarded as unreasonable; (2) the taxing masters are bound to follow the decided cases, which are very numerous, and the rules and regulations made from time to time by the Rules Committee, some of which, as the Evershed Committee pointed out, are long overdue for revision.

The Law Society recommended to the Evershed Committee that there should be an appellate taxing master to whom an appeal could be made, and we regret that the Committee did not adopt this suggestion since it would not conflict with the right of the litigant to go to a judge on any matter of principle.

The framers of the memorandum summarised in your paragraph evidently share our regret but suggest that the appropriate appellate tribunal would be an official referee.

The taxing masters are recruited from the solicitors' profession and are, we suggest, much better qualified than would be an official referee who is recruited from the Bar where fees are fixed by barristers' clerks.

We do not think that it can be disputed that in an appeal the tribunal would have to read all the papers in order to judge the value of the work done for which the charge was made, and it seems inevitable, therefore, that any appellate tribunal must be whole-time employed. Only someone engaged in the practice of the law can properly assess legal costs, and a busy practitioner in either branch of the profession could not be expected to give the necessary time to reading papers. It seems inevitable, therefore, that if special appellate jurisdiction on matters of quantum were to be given to anyone it must be one or more of the taxing masters themselves.

To err is human, and taxing masters are certainly that. One would have no reason to suppose that any taxing master would object to another member of his body being given jurisdiction to correct human error.

London, E.C.2. HOLMES, SON & POTT.

Sir,—Taxing masters are not popular officials.

They cannot defend themselves in your periodical and there is hardly likely to be a rush of correspondents to do so on their behalf.

I cannot help wondering what practical experience of taxations is claimed by any of the signatories to the memorandum prepared by the Inns of Court Conservative and Unionist Society upon the Evershed Report and referred to in your columns recently.

Taxing masters would no doubt be the first to admit their human frailty but the assertion in that memorandum that they have not the training or experience necessary to assess the value of the work done by counsel cuts no ice whatsoever with those of us whose experience is based on attendances before them on hundreds of taxations spread over many years.

After all, they are practising solicitors of many years' standing prior to appointment.

I personally have never encountered anything which could be described as a "rule of thumb" method unless by "rule of thumb" is meant uniformity of practice which seems, on the whole, desirable.

Nor have I ever met the percentage reduction referred to.

When one is taxing one's own bill, the taxing master seems to be cheeseparing in the extreme, but when one is taxing the other fellow's bill he seems to be animated by quite unjustifiable generosity.

One's reaction depends so much on which side of the fence one is.

Most of us who have to attend taxations consider that by and large the taxing masters do a pretty good job of work.

London, W.C.1. G. W. FISHER.

BOOKS RECEIVED

Six Lectures for Justices. Prepared by the Training Board of The Magistrates' Association, with an Introduction by The Right Hon. LORD SIMONDS, Lord Chancellor. 1953. pp. viii and 117. London: The Magistrates' Association. 6s. net.

The Legal Aspect of Money. Second Edition. By F. A. MANN, LL.D. (Lond.), Dr. Jur. (Berlin), Solicitor of the Supreme Court. 1953. pp. xxxiv and (with Index) 488. Oxford: Geoffrey Cumberlege; Oxford University Press. £2 10s. net.

MacGillivray on Insurance Law. Fourth Edition. By E. J. MACGILLIVRAY, LL.B., Q.C., Member of The Faculty of Advocates in Scotland, and DENIS BROWNE, M.A., of Lincoln's Inn, Barrister-at-Law, Professor of Law in the University of Sheffield. 1953. pp. lxxix, 1344 and (Index) 49. London: Sweet & Maxwell, Ltd. £9 9s. net.

Daly's Club Law. Fifth Edition. By C. J. COLLINGE, B.A. (Oxon), a Chief Clerk of the Metropolitan Magistrates' Courts. 1954. pp. xxviii and (with Index) 174. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 18s. 6d. net.

Guide to the Legal Profession. Fourth Edition. By MAURICE W. MAXWELL. 1954. pp. x and (with Index) 136. London: Sweet & Maxwell, Ltd. 7s. 6d. net.

The Law of the Air. By Sir Arnold Duncan McNair, Q.C. Second Edition by MICHAEL R. E. KERR, M.A., of Clare College, Cambridge, and of Lincoln's Inn, Barrister-at-Law, and ROBERT A. MACCRINDLE, LL.B., of Gonville and Caius College, Cambridge, and of Gray's Inn, Barrister-at-Law. 1953. pp. xxiii and (with Index) 500. London: Stevens & Sons, Ltd. £3 3s. net.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

REVENUE: DEATH DUTY: DISCRETION OF COMMISSIONER: POWER OF COURT TO REVIEW

Commissioner of Stamp Duties of New South Wales *v.* Pearse and Others

Viscount Simon, Lord Reid, Lord Radcliffe, Lord Asquith of Bishopstone and Lord Cohen. 9th December, 1953

Appeal from the High Court of Australia.

By s. 125 of the New South Wales Stamp Duties Act, 1920–40, the Commissioner of Stamp Duties is empowered to ascertain the value of any property for the purposes of death duty by such means as he may think fit, but subs. (2) of that section provides that his assessment shall be subject to appeal under s. 124 of that Act, and his powers have also, as regards company shares, to be read as subject to s. 127 (1). Section 124 requires the commissioner, on the application of an administrator who is dissatisfied with an assessment to death duty, to state a case for the opinion of the Supreme Court, and contains provisions for ascertaining all the facts necessary to enable the question submitted to the court to be determined, and further provides that on the hearing of the case the court shall determine the question submitted and shall assess the duty chargeable. Section 127 (1) provides that: "(*c*) . . . the commissioner may in his discretion adopt as the value of a share . . . in any company the shares of which . . . are not listed on a stock exchange such sum as in the opinion of the commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound up . . ." The commissioner having rejected a valuation by executors of the ordinary shares which a testator had held in a company not listed on a stock exchange—the shares having been valued by a firm of chartered accountants at £2 6s. 6d. per share—and in the exercise of his discretion under s. 127 (1) (*c*) adopted the sum of £7 16s. 10d. per share as being the sum which, in his opinion, the holders of the shares would have received in a winding up, a case was stated at the request of the executors which, in substance, raised as the real contest between the parties the question whether the court had jurisdiction to substitute its own discretion for that of the commissioner as to the mode of valuation and the value to be adopted. The Supreme Court of New South Wales (Street, C.J., Maxwell and Owen, JJ.) held that it had that jurisdiction, and the High Court of Australia (Dixon, C.J., McTiernan, Williams, Webb and Fullager, JJ.) on appeal affirmed that decision. There was also a cross-appeal which raised the question whether the commissioner was entitled to levy the higher rate of death duty specified in the fourth column of Sched. VII to the Act on the whole or any part of the sum of £250, being the agreed amount of the legal costs which one of the respondents to the appeal, who was a solicitor and a trustee of the will of the testator, was entitled to charge against the testator's estate under the provisions of a clause in the will. The Supreme Court held that duty at the higher rate was leviable on the whole £250, and that decision was also upheld by the High Court (Dixon, C.J., and Fullager, J., dissenting).

LORD COHEN, delivering the judgment of the Board, said that the effect of the New South Wales Stamp Duties Act, read as a whole, was to leave the court with unfettered power of review of the conclusion reached by the commissioner. As s. 124 conferred such wide general powers of review, both of fact and of law, and imposed on the court the definite obligation to assess the duty chargeable, it was impossible to extract from s. 127 (1) (*c*) an exclusion from those powers of the right to question both the mode of valuation and the value adopted by the commissioner. Paragraph (*c*) contained no sufficient indication that there must be attributed to the Legislature the capricious intention that the court should remain under the duty of deciding a dispute between the subject and the commissioner as to the value of the shares, but should be handcuffed to the particular mode chosen by the commissioner. The observations of the High Court of Australia in *Commissioner of Stamp Duties for Queensland* v. *Beak* (1931), 46 C.L.R. 585, at p. 597, so far as they related to discretion, were to be treated only as *obiter*. With regard to the cross-appeal, duty was payable at the higher rate specified in the fourth column of Sched. VII to the Act on the whole £250 paid to the solicitor-executor as legal costs. The provision in the will conferred a gift on the solicitor-executor and enabled him to take out of the assets of the testator something which the law would not otherwise allow. *Re Brown* [1918] W.N. 118 and *Re Thorley* [1891] 2 Ch. 613 were referred to. Appeal and cross-appeal dismissed.

APPEARANCES: *G. Wallace*, Q.C. (Australia), *Sir Frank Soskice*, Q.C., and *E. B. Stamp* (*Light & Fulton*); *Sir Garfield Barwick*, Q.C. (Australia), and *R. J. Parker* (*Burton, Yeates and Hart*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 5**

COURT OF APPEAL

NEGLIGENCE: BUSINESS CANVASSER: WHETHER LICENSEE OR INVITEE

Dunster *v.* Abbott

Somervell, Denning and Romer, L.JJ.
13th November, 1953

Appeal from Ormerod, J.

The plaintiff, a canvasser, called on the defendant, a builder, in order to sell him advertising space on the covers of telephone directories. He had no appointment with the defendant, but earlier in the day had been informed by the defendant's wife that her husband would be home in the evening. The defendant was not interested in the offer made by the plaintiff, and saw him out on to the pathway which led from the house and across a bridge over a ditch to the public road. It was a dark and rainy night, but the pathway was to some extent illuminated by an electric lamp attached to the defendant's garage. This lamp was not switched off until the defendant estimated that the plaintiff had reached the roadway. In fact, the plaintiff had only reached the bridge, and misjudging his position he turned to the right and fell into the ditch, sustaining injury. He sued the defendant for damages. Ormerod, J., gave judgment for the plaintiff. The defendant appealed.

SOMERVELL, L.J., said that there had been much debate as to whether the plaintiff was a licensee or an invitee, and it had been contended that anyone who came on to business premises hoping

to do business was an invitee; but that was far wider than the definition of Asquith, L.J., in *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353, that an invitee is a person "who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest." Here the plaintiff was hoping that the defendant might be interested in his business; he was a licensee. In the present case there was no unusual danger. There was an ordinary means of access to a house over a ditch, which was common enough. As to whether the defendant had been negligent in turning out the light too soon, it was doubtful whether the light was of any use at the place where the plaintiff fell. In view of the surrounding circumstances, the plaintiff could not establish negligence. The defendant was not under any obligation to turn the light on, but he had turned it on and left it on for what seemed to be a reasonable time. The plaintiff had asked for trouble by going about without a torch. The appeal should be allowed.

DENNING, L.J., agreeing, said that a canvasser who came in without consent was a trespasser; once he had consent, he was a licensee; not until business was done was he an invitee. The position, when business was discussed, and came to nothing, could not be answered confidently; such was the morass into which the law had floundered. The plaintiff was a licensee, but it did not matter whether he was that or an invitee, because the distinction was material only in relation to the static condition of the premises, and had no relevance to dangers brought about by the contemporaneous acts of the occupier. In the present case there was nothing in the premises to constitute a danger to anyone who used reasonable care for his own safety, and there was not sufficient evidence to warrant a finding of negligence.

ROMER, L.J., agreed. Appeal allowed.

APPEARANCES: *M. Berryman*, Q.C., and *M. Jukes* (*Hair & Co.*); *G. Gardiner*, Q.C., and *H. Sabin* (*Miss Betty Harris*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 58

MORTGAGE: RENT ACTS: INTEREST IN ARREARS: LOSS OF STATUTORY PROTECTION

Nichols and Another *v.* Walters

Evershed, M.R., Jenkins and Morris, L.J.J. 25th November, 1953

Appeal from Danckwerts, J.

In 1951, Miss Walters, the tenant of premises within the Rent Acts, bought the freehold reversion with the aid of a mortgage to the defendants. In June, 1952, the mortgagees served a notice calling in the mortgage moneys, although at that date the defendant was not in arrears with her payments of interest. In September, however, she failed to pay the interest due from her and allowed it to get considerably more than twenty-one days in arrears, and she also did not pay a premium due on a life insurance policy. On 17th December, 1952, the plaintiffs issued a summons asking for an order for possession against Miss Walters. The summons came before the master on 3rd February, 1953, but was stood over with liberty to restore on Miss Walters undertaking to pay off the arrears at once. She paid the arrears on 7th February; but on 10th February the summons was restored and an order was made against her. On appeal to the judge, Danckwerts, J., upheld the master's order. Miss Walters appealed.

EVERSHED, M.R., said that though the original notice served by the mortgagees in June, 1952, was apparently bad, Miss Walters' subsequent failure to pay interest due for more than twenty-one days deprived her of any protection which she might have had, assuming, but not deciding, that the Rent Acts had continued to apply after Miss Walters had purchased the house for her own occupation. The statutory protection once gone could not be revived by a subsequent payment of the arrears, and consequently the order made against her was valid.

JENKINS and MORRIS, L.J.J., agreed. Appeal dismissed. Leave to appeal refused.

APPEARANCES: *C. B. Guthrie* (*Farrar, Porter & Co.*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 1

INCOME TAX: TAKING OVER OF WAGONS BY TRANSPORT COMMISSION WITH COMPENSATION: BALANCING CHARGE

John Hudson & Co., Ltd. *v.* Kirkness (Inspector of Taxes)

Singleton, Birkett and Hodson, L.J.J. 2nd December, 1953

Appeal from Upjohn, J. ([1953] 1 W.L.R. 749; 97 SOL. J. 403).

On 1st January, 1948, the property in the railway wagons of the taxpayers, a company of coal merchants, vested in the Transport Commission under s. 29 of the Transport Act, 1947, compensation being paid, in accordance with s. 30 (1) by reference to Sched. VI, in the form of transport stock as provided by s. 32 of the Act. The company's compensation was for an amount substantially higher than the written down value of the wagons for income tax purposes, and they were accordingly assessed in the year 1948–49 in the sum of £29,021, in respect of a balancing charge under s. 17 of the Income Tax Act, 1945, the wagons falling within the description of machinery or plant in the opening words of that section. The company appealed to the Special Commissioners for Income Tax, contending, *inter alia*, that the transaction was not a sale, either within the meaning of s. 17 (1) (*a*) or at common law, since there was no mutual consent, while the Crown contended that the transfer was a sale albeit of a compulsory nature and within the meaning of the section. The Special Commissioners held that the transaction was a sale, but Upjohn, J., reversed that decision, holding that the transaction was not a sale, either at common law or within the meaning of s. 17 or by reference to other sections of Taxing Acts.

The Crown appealed.

SINGLETON, L.J., said that the word "sold" in s. 17 (1) (*a*) of the Act of 1945 assumed a seller and a buyer. The company's wagons were "acquired," as the Act said, and on 1st January, 1948, the property in them vested in the Commission. The authority on the subject of sale, "Benjamin," said that there must be parties competent to contract, mutual assent, a thing, and a price in money paid or promised. Here there had been no sale according to the ordinary use of that word or according to the definition as accepted by the courts for a long time. By s. 29 of the Transport Act, 1947, there was a statutory vesting—a change of ownership brought about by the statute. There was nothing there which had the appearance of bargain and sale or of sale; and nothing in the provisions of that Act which led him (his lordship) to think that the word "sold" in s. 17 (1) (*a*) of the Act of 1945 had any meaning different from that in which it was normally used. Nor did he think that the vesting of wagons in the Commission was a compulsory sale or in the nature of such a sale, by analogy with the authorities on compulsory acquisition of land, for s. 8 of the Transport Act drew a clear distinction between compulsory purchase of that kind and the acquiring of railway wagons under s. 29, and the compensation provisions were also wholly different. There was in the circumstances no sale and the judgment of Upjohn, J., was right. The appeal should be dismissed.

BIRKETT, L.J., delivered a concurring judgment.

HODSON, L.J., agreed. Appeal dismissed.

APPEARANCES: *Cyril King*, Q.C., and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *John Senter*, Q.C., and *Anthony Barber* (*Willis & Willis*, for *Taynton & Son*, Gloucester).

[Reported by Miss M. M. HILL, Barrister-at-Law] [1 W.L.R. 40

LIBEL: STATEMENT THAT PLAINTIFFS WERE "DISMISSED": CAPABILITY OF DEFAMATORY MEANING INAPPROPRIATE AS PRELIMINARY POINT UNDER R.S.C., Ord. 25, r. 2

Morris and Another *v.* Sanders Universal Products

Jenkins and Morris, L.J.J. 4th December, 1953

Appeal from Lord Goddard, C.J.

The two plaintiffs had been employed as sales managers by the defendants until 20th June, 1952, when their employment terminated. Shortly afterwards the defendants sent circular letters to certain of their customers in the several areas in which the plaintiffs respectively had been employed, stating in each case that "We have dismissed" the plaintiff who worked in that area. In this action the plaintiffs each claimed damages for libel, alleging that the words of the circular letters meant that the plaintiffs had respectively been dismissed against their will, in circumstances which were discreditable. The defendants applied under R.S.C., Ord. 25, r. 2, to have the issue tried as a preliminary point of law whether the words complained of had in their ordinary significance any defamatory meaning. Lord Goddard, C.J., held that the point of law failed, and the defendants appealed.

JENKINS, L.J., referred to the statement of the duty of the judge in such cases in Lord Porter's speech in *Turner* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* [1950] W.N. 83; 66 T.L.R. (Pt. 1) 342, and said that the test was whether it could be said that a jury could reasonably come to the conclusion that the words complained of were defamatory, and in applying that test the function of the court was to endeavour to decide what

meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. Looking at the circular letters from that point of view, notwithstanding the various inoffensive meanings which the words "We have dismissed" the plaintiff might be capable of bearing, it was not possible for the court to say that the words complained of were not capable of a defamatory meaning or that a jury might not hold them to be defamatory. The case must accordingly go forward to trial for determination whether the words in fact bore a defamatory meaning. His lordship said also that the procedure laid down in R.S.C., Ord. 25, r. 2, was unsuitable for the purpose for which it was used in this case, for it would be a most undesirable practice to try libel actions in two stages, the first being to decide whether the words complained of were capable of bearing a defamatory meaning and the second being the trial of the case itself in the event of the defendants failing to put a summary end to the proceedings on the preliminary issue.

MORRIS, L.J., agreed. Appeal dismissed.

APPEARANCES: *Guy Aldous* (*Stilgoes*); *John F. Marnan* (*Franks, Charlesley and Leighton*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 67

CHANCERY DIVISION

WILL: GIFT TO HOSPITALS: CONDITIONAL DEFEASANCE IN THE EVENT OF AMALGAMATION

In re Hayes' Will Trusts; Dobie and Others *v.* Board of Governors of National Hospital and Others

Vaisey, J. 22nd October, 1953

Adjourned summons.

A testator in 1938 made his will bequeathing to his trustees a sum which he called the "wife's trust legacy" on trust to invest it and in their absolute discretion to pay the whole or any part of it to or for the maintenance and support of his wife. Subject thereto, that legacy or such part of it not so applied and the income of it not required for those purposes was to fall into his residuary estate. By cl. 10 he provided that his residuary trust funds were to be divided equally between such of twenty-nine named charitable institutions as should be in existence at his death, but so that any sum or property falling into those funds after his death should be equally divided between such of the institutions as should be in existence when it fell in. By cl. 11 he provided: ". . . my trustees may if they . . . think fit exclude any one or more of such institutions from sharing in the residuary trust funds or in any sum or property falling into the residuary trust funds . . . after my death if in the opinion of my trustees it shall be impracticable or inequitable that such institution or institutions should so share in consequence of . . . having before my death or before such sum or property falls in as aforesaid . . . become amalgamated with some other institution or institutions. . . ." On 5th July, 1948, the National Health Service Act, 1946, came into force and in 1949 the widow died. The questions arose whether the twenty-nine institutions were "in existence" within the meaning of cl. 10 of the will at the dates of the testator's and the widow's death: if they were, whether on her death all or any of them had become "amalgamated with some other institution or institutions" within the meaning of cl. 11; and, if any of them had, whether the trustees would have under cl. 11 a discretionary power to exclude it from sharing in the residuary trust funds or whether the discretionary power given in that clause was not exercisable by reason of any provision in the National Health Service Act, 1946.

VAISEY, J., said that cl. 11 was difficult and ambiguous, and it was difficult to know what the testator had in mind when he wrote it. It could not, however, have been the Act of 1946, which was not in contemplation in 1938. According to Chambers' dictionary, "impracticable" meant "not able to be done," and "inequitable" meant "unfair; unjust." In law, "inequitable" was something against which the court was bound always to strive, and would never permit to be done. The trustees did not have to consider these matters at large, but only in connection with an amalgamation. It had been held that a hospital affected by the Act remained a charity; and it could not be said that any amalgamation of hospitals under the Act made it "impracticable" or "inequitable" for a nationalised hospital to share in the testator's bounty. That was really the end of the case, but the trustees were very anxious to carry out the difficult and invidious duty laid on them, as they thought that that would be the testator's wish, and as they did not wish the money to go to nationalised hospitals. But the truth was that they had no fiduciary power in the present case. "Amalgamation" had no definite legal meaning (*In re Walker's Settlement* [1935] Ch. 567); so it had to be construed according to the context, and in the present context it must be such as to raise a case of impracticability and inequity, and no such amalgamation had taken place; the words to be construed were quite different from those in *In re Bawden's Settlement*,* and that decision did not assist. There would be declarations that there had been no amalgamations within the meaning of the will; and that there was no discretionary power in the trusteees to exclude any institution.

APPEARANCES: *H. A. H. Christie*, Q.C., and *A. H. Droop*; *P. Foster*; *E. M. Winterbotham*; *Sir Lynn Ungoed-Thomas*, Q.C., and *H. E. Francis*; *J. A. Brightman*; *J. G. Strangman*, Q.C., and *D. H. McMullen*; *V. M. C. Pennington*; *F. B. Marsh*; *Denys Buckley* (*Rider, Heaton, Meredith & Mills*, for *Brown, Dobie & Rogers*, Chester; *Linklaters & Paines*; *Waterhouse and Co.*; *Farrer & Co.*; *Trower, Still & Keeling*; *Boyce, Evans and Sheppard*; *Hanbury, Whitting & Ingle*; *Treasury Solicitor*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 22

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* ***In re* Bawden's Settlement; Besant and Others *v.* Board of Governors of London Hospital and Others.**

Danckwerts, J. 23rd January, 1953

Adjourned summons.

A settlement dated December, 1905, provided by cl. 4 that the trustees should pay the annual income of a trust fund to or between the charities and institutions mentioned, and in the shares and proportions indicated, in the schedule thereto. Clause 8 provided, *inter alia*, that, if any of those charities or institutions should become amalgamated with or absorbed in any other charities or institutions, the trustees might in their discretion pay or apply the appropriate share or proportion of the annual income of the trust fund to or for the benefit of the charity or institution with or in which it should have become amalgamated or absorbed, or might apply it to or for such other objects or purposes of charity or benevolence or amelioration of human suffering or advancement of knowledge as they should in their opinion consider to be in accordance with the original desire and intention of the testator. On 5th July, 1948, the National Health Service Act, 1946, came into force. Of the charities and institutions mentioned in the schedule to the settlement, the London Hospital and Queen Mary's Maternity Home were, by an order of 7th May, 1948, made pursuant to s. 11 (8) of the Act, together designated a teaching hospital; and the Poplar Hospital for Accidents became one of a group of three hospitals grouped together as "No. 8 Bow." By this summons, which was taken out in 1949, the trustees of the settlement asked whether on the true construction of the settlement and of the National Health Service Act, 1946, and in the events which had happened, the share of the annual income of the trust fund which before 5th July, 1948, was payable to or for the benefit of the London Hospital had been since that date and was at the date of this summons (*a*) payable to the Board of Governors of the London Hospital; (*b*) payable or applicable according to the trusts declared in cl. 8 of the settlement to or between the charities, institutions, objects or purposes in that clause referred to; or (*c*) held on a resulting trust for the settlor's estate on the footing that the trusts declared in cl. 8 were void; or (*d*) held on any other and what trusts. They asked like questions with regard to the Poplar Hospital for Accidents.

DANCKWERTS, J., said that in the case of the London Hospital and Queen Mary's Maternity Home there had been an amalgamation within the meaning of cl. 8 of the settlement, in consequence of s. 11 (8) of the Act and the order made thereunder; the subsection provided that any group constituted thereunder should "be deemed for the purposes of the Act to be a single hospital." The Poplar Hospital was not a teaching hospital, so that subss. (3) to (6) applied instead of subs. (8); it was one of a "group" which shared a management committee, but there was no "amalgamation" within the meaning of the settlement, a word which did not have a technical meaning. The question remained whether the share of the London Hospital was taken away, or might be taken away under the discretionary power by the trustees. It had been argued that s. 60 of the Act overrode any provisions of the trust which would divert the funds, but that was not the intention of the section. Under the settlement, in the event of an amalgamation a discretionary trust arose under which the trustees could divert the share of the amalgamated charity to such other objects of charity or benevolence as they

thought fit. That was a trust for a non-charitable purpose; in the result there was a defeasance clause in favour of a non-charitable purpose which might come into effect after the perpetuity period. The clause was therefore inoperative, and the gift in favour of the London Hospital took effect.

APPEARANCES: *H. E. Francis (Bircham & Co.)*; *V. M. C. Pennington (Hanbury, Whitting & Ingle)*; *Sir Lynn Ungoed-Thomas*, Q.C., and *J. A. Armstrong (Farrer & Co.)*; *R. H. Walton (E. F. Turner & Sons)*; *D. H. McMullen (Boyce, Evans and Sheppard)*; *J. A. Wolfe (Farman, Daniell & Co.)*; *N. S. Warren (Treasury Solicitor)*.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 33

CHARITY: APPEAL FOR ERECTION AND MAINTENANCE OF VOLUNTARY HOSPITAL: SCHEME LATER IMPRACTICABLE: ENTITLEMENT TO FUNDS RAISED

***In re* Hillier's Trusts; Hillier and Another *v.* A.-G. and Another**

Upjohn, J. 10th November, 1953

Adjourned summons.

In 1938 and 1939 an appeal was launched for the improvement of hospital services in the Slough area, and in particular for the extension of accommodation at Windsor Hospital and for the erection of a new hospital at Slough. The appeal was launched by a "council," who constituted three persons, of whom the second plaintiff was the sole survivor, as the "Slough Hospital Trustees" under a trust deed. A brochure was issued calling for subscriptions and donations; this pointed out the serious lack of hospital accommodation in the area, and emphasised at length and in the strongest terms, the superior advantages of "the truly British characteristic of making provision, without force" for voluntary hospitals. The brochure was accompanied by forms to be filled in by donors and subscribers, of which "document 1" provided for subscriptions in three forms: "Council's discretion; Windsor Hospital; Slough Hospital." Another form ("document 2") provided for seven years' covenants to subscribe towards the augmentation of the income or capital of (*a*) such hospitals as the council might nominate; (*b*) the Windsor hospital; (*c*) the Slough hospital; (*d*) a hospital nominated by the covenantor. Substantial sums were received under the terms of these documents, and were also raised locally by means of concerts, church collections, whist drives, etc. The sums specifically allocated by the donors to the enlargement of the existing Windsor hospital were duly so applied, and on that no question arose. In 1942 the contributions allocated for distribution at the council's discretion were transferred to the Slough trustees. It was never possible to build the proposed hospital at Slough; first, owing to war conditions, and secondly, because the provisions of the National Health Service Act, 1946, precluded the creation of new voluntary hospitals. The question for decision was how to deal with the "Slough" and unallocated funds in the hands of the surviving "Slough" trustee. The Attorney-General, and the Official Solicitor (representing the various classes of donors, subscribers and contributors) were made defendants.

UPJOHN, J., said that there was no difficulty regarding the sums given under documents 1 and 2 subject to the discretion of the council; in such gifts there was plainly a general charitable intent, and they could be applied by the council among the various existing hospitals in the area. The difficulty arose with regard to the gifts allocated to Slough, and with the proceeds of concerts and the like. On the facts, the erection of a voluntary hospital at Slough was now impracticable; so that the question arose whether the express donations to Slough under the documents could be devoted towards the erection of a hospital there by the Ministry of Health (which was in contemplation), or whether, in the absence of a general charitable intent, there was a resulting trust for the donors. The intention of the donors must be looked at in conjunction with the terms of the appeal, the whole tenor of which was directed to a scheme for voluntary hospitals not State hospitals; accordingly the intention of the Slough donors had become impracticable. Apart from authority, it seemed clear that the donors to Slough had a voluntary hospital at Slough only in mind; that there was no general charitable intent, so that there was a resulting trust in their favour. It was said that the *Netley* ([1921] 1 Ch. 655) and *North Devon and West Somerset* ([1953] 1 W.L.R. 1260; 97 SOL. J. 728) cases negatived that conclusion. But in both those cases (*a*) the documents to be construed were the appeals only, which were in general terms for charitable objects, and (*b*) the question was as to the disposal of surplus funds after the charitable objects had been fully provided for. Whereas in the present case (*a*) not only the appeal, but documents 1 and 2 submitted by the donors had to be construed, under which the gifts in question were specifically earmarked for a voluntary hospital at Slough which (*b*) had become impracticable, so that the funds for the unfulfilled charitable purpose remained in hand. Those cases were, therefore, distinguishable, so that there was a resulting trust in favour of the Slough donors. There remained the question of the funds raised by concerts, whist drives, etc. Certain observations in the *Netley* case, *supra*, showed plainly that such contributors never expected their money back. But there had been a complete failure of the charitable purpose, and it had not been argued whether there was a general charitable intent, or whether those funds became *bona vacantia*. All that could be said was that the contributors no longer had any interest in the fund. Declaration accordingly.

APPEARANCES: *J. L. Arnold (Kenneth Brown, Baker, Baker)*; *Denys Buckley (Treasury Solicitor)*; *Peter Foster (Official Solicitor)*.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 9

COMPANY: SHARES VESTED IN TRUSTEES: MOTION BY BENEFICIARIES TO DIRECT TRUSTEES' METHOD OF VOTING

***In re* George Whichelow, Ltd.; Bradshaw *v.* Orpen**

Upjohn, J. 24th November, 1953

Interlocutory motion.

Three blocks of shares in a company were left by a testatrix in trust for each of her three daughters respectively for life, with remainder to their children who should attain twenty-one. After disputes had arisen regarding the conduct of the company's affairs and the fitness for office of certain directors, a general meeting was called and notices were given of six resolutions to be moved for the appointment to or removal from the board of named persons. The three daughters and their eight children sent a notice to the trustees directing them either to appoint the eldest of the daughters as their proxy, or to vote in a certain way on the resolutions. The trustees declined to take these directions, and stated that they would use their votes in accordance with their discretion. The beneficiaries then issued a writ against the trustees, and by interlocutory proceedings moved for orders that the trustees should comply with the directions given to them, and should be restrained from voting otherwise. The first three plaintiffs, the tenants for life, were respectively aged sixty-one, fifty-eight and fifty-two; and the plaintiffs contended that the class of beneficiaries was thus closed, so that they had the right to direct the way in which the votes of the trustees should be used.

UPJOHN, J., said that the question was one of law. The beneficiaries relied on certain observations in *In re Butt; Butt* v. *Kelson* [1952] Ch. 197, at p. 207, where it was said that all the persons entitled to the beneficial interest in shares could compel trustee directors to use their votes as they were told; they also relied on *In re Thornhill* [1904] W.N. 112, where a payment out of court was allowed on the assumption that the mother was past child-bearing; and similarly on *In re Smith* [1928] 1 Ch. 915. The trustees, on the other hand, did not wish to surrender their discretion, and it appeared that they had acted in a thoroughly *bona fide* manner in very difficult circumstances. They relied on *In re Brockbank* [1948] Ch. 206; *In re Higginbottom* [1892] 3 Ch. 132; and a passage in Underhill on Trusts, 10th ed., at p. 427, where it was said that when it was morally certain that there were no more beneficiaries, the court would on summons give the trustees liberty to act in accordance with the wishes of the beneficiaries, but would not compel them to do so. In *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571, it was said to be settled law that the court would not force trustees to exercise a discretionary power against their wishes. The cases were difficult to reconcile, but in the present case it would not be right to grant the relief asked on interlocutory motion. Here were trustees, against whom nothing could be said, anxious to exercise their discretion. They had not had a direction from all persons beneficially entitled, because until an order was obtained giving leave to presume that the first three plaintiffs were past the age of child-bearing, it could not be said in law that they were past that age. The motion must be dismissed. Order accordingly.

APPEARANCES: *R. Jennings*, Q.C., and *K. J. T. Elphinstone (Stilgoes)*; *W. T. Elverston (Bischoff & Co.*, for *FitzHugh, Woolley and Burnand*, Brighton).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 5

QUEEN'S BENCH DIVISION

PRACTICE DIRECTION: SETTLEMENTS ON ASSIZE

Lord Goddard, C.J. 2nd December, 1953

The Practice Direction dated 21st April, 1947, set out in the Annual Practice as a note to Ord. 36, r. 22B, dealing with the settlement of actions before they come into the day's list at assizes applies to cases in which either party is under a disability provided that a master or district registrar has approved the settlement.

[[1953] 1 W.L.R. 1479

VAGRANCY: LIVING ON THE EARNINGS OF PROSTITUTION

Calvert *v.* Mayes

Lord Goddard, C.J., Sellers and Barry, JJ.
9th December, 1953

Case stated by the Recorder of King's Lynn.

The defendant was habitually in the company of prostitutes and exercised direction and influence over their movements and generally aided and abetted their prostitution. He knowingly permitted and encouraged the use of his house and a hire-car driven by him for the purposes of prostitution. The prostitutes themselves received no money from the men concerned, nor did they pay any money to the defendant, but he received money from the men for the use of his house and his car which, but for the prostitution, he would never have received. The defendant was convicted by justices of living in part on the earnings of prostitution contrary to s. 1 (1) of the Vagrancy Act, 1898, which provides that "every male person who (*a*) knowingly lives . . . in part on the earnings of prostitution . . . shall be deemed a rogue and a vagabond." Subsection (3) provides: "Where a male person is proved . . . to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person . . . he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution." On appeal the Recorder considered that, although the evidence would support a charge of keeping a brothel, there was no evidence to support a charge of living in part on the earnings of prostitution, and he quashed the conviction. The prosecutor appealed.

LORD GODDARD, C.J., said that the position was just the same as if the money had been paid to the prostitute and she had handed it over to the defendant. He was living on the earnings of prostitutes because they were earning money which otherwise he would never have been paid. It did not matter whether he received the money from the hand of the men concerned, or whether the men handed it to the prostitute and she handed it to the defendant. The words of the Act were wide enough to cover the defendant's conduct; each case must be considered on its own particular facts but in the present case the Recorder's decision must be reversed and the conviction restored.

SELLERS, J., said that he agreed that, although it might be an extension of the interpretation previously given to the Act, the facts of the case brought it within s. 1 (1). In his view it certainly came within s. 1 (3), and the Recorder's findings in no way established the facts necessary to satisfy the court that the defendant was not living on the earnings of prostitution.

BARRY, J., agreed. He said that he felt that the decision of the court was dependent upon the finding that the defendant knew that the women were prostitutes and habitually exercised direction and influence over their movements, aiding and abetting their prostitution. Appeal allowed.

APPEARANCES: *L. K. E. Boreham* (*Metcalfe, Copeman and Pettefar*); *Edward Gardner* (*Jaques & Co.*, for *Ollard, Ollard and Sessions*, Wisbech).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[2 W.L.R. 18**

CATERING WAGES ACT: GARAGE AND CAFÉ: MAN AND WIFE ENGAGED JOINTLY AS MANAGER AND MANAGERESS: NOT WITHIN ACT

Parkinson *v.* H. and J. Plumpton (a firm)

Lord Goddard, C.J. 10th December, 1953

Action.

The defendants, who were at all material times in partnership, owned several garages with cafés attached in various parts of Lancashire. They sought a married couple to manage one of these, the Hillock Garage and café, and engaged the plaintiff, Mrs. Doris Parkinson, and her husband at a weekly wage of £4 10s. a week plus a commission of 20 per cent. of the net profits. No particular duties were specified except that the plaintiff was to manage the café and her husband was to be manager of the garage. The plaintiff and her husband were required to live in an unfurnished room at the café and they were both to have full board. In February, 1949, they took up their duties and the plaintiff brought her own furniture into the room at the café. After December, 1949, the plaintiff, without the defendants' knowledge or consent, left the café at about 7 p.m. and went to her own house for the night. Her employment ended in May, 1950, when the business was sold. The plaintiff claimed from the defendants the sum of £238 5s. 10d. which, she alleged, was arrears of remuneration owing to her. This amount represented the difference between what she alleged to be the statutory minimum remuneration laid down by the Catering Wages Act, 1943, and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, and the weekly wage she, in fact, received. The defendants denied that there were any arrears. The proceedings were instituted on the plaintiff's behalf by reason of s. 13 (4) of the Act of 1943 by the officer acting for the purposes of that Act.

LORD GODDARD, C.J., said that joint engagements such as that of the plaintiff and her husband were not within the ambit of the Act because, under the terms of such an engagement, it was impossible to apportion the joint wage—which on its own amounted to not less than the statutory minimum remuneration—between the plaintiff and her husband. Even had the Act applied, the regulation in question did not provide a minimum wage for employees provided with full board but no lodging, and the unfurnished room supplied for the plaintiff's use did not constitute "lodging" within the meaning of the regulation. Judgment for defendants.

APPEARANCES: *S. B. R. Cooke* (*Solicitor, Ministry of Labour and National Service*); *W. E. Behrens* (*Gregory, Rowcliffe & Co.*).

[Reported by Miss SHEILA COBON, Barrister-at-Law.] **[1 W.L.R. 75**

PROBATE, DIVORCE AND ADMIRALTY DIVISION

HUSBAND AND WIFE: WILFUL NEGLECT TO MAINTAIN: NO POWER TO ORDER TO ALIMONY *PENDENTE LITE*

S. *v.* S.

Collingwood, J. 2nd December, 1953

Appeal from Birmingham district registrar.

On 12th November, 1953, the registrar of the district registry, Birmingham, dismissed the wife appellant's application for an order for alimony pending suit in proceedings brought by her under s. 23 of the Matrimonial Causes Act, 1950. The appellant Dorothy Annie "S", of West Bromwich, was the wife of James Douglas "S", and on 23rd June, 1953, she issued an originating summons under s. 23 of the Matrimonial Causes Act, 1950, on the ground that her husband had wilfully neglected to provide reasonable maintenance for her. The respondent husband was employed at Lagos, in British West Africa, and because of this some delay in the proceedings became inevitable. On 14th October, 1953, the wife accordingly gave notice of an application to the court for an order that the husband pay her a weekly (or monthly) sum in respect of alimony pending suit. Her application was dismissed by the district registrar on the ground that there was no power in the court to make the order for which she asked. The wife appealed. (*Cur. adv. vult.*)

COLLINGWOOD, J., considered the provisions of r. 56 (10) and (16) of the Matrimonial Causes Rules, 1950, which make no provision other than for an interim order to be made by a judge at the hearing of an application, and a submission that the court had an inherent power to make an order *pendente lite*. His lordship rejected that submission, in support of which reliance had been placed on *Welton* v. *Welton* [1927] P. 162, holding that the wife was not "a competent suitor in a matrimonial cause" within the meaning of that phrase as used in that case. Section 23 of the Matrimonial Causes Act, 1950, contained no provision for interim payments such as those provided for in ss. 19 (1), 20 (1) and 22 (1); and the application for alimony *pendente lite* had been rightly rejected. Appeal dismissed.

APPEARANCES: *George Heron* (*Beckingsales*, for *Adcock, Williams*, West Bromwich); *A. A. Shenfield* (*Saunders, Sobell, Greenbury & Leigh*, for *Jacobs, Bird & Co.*, Birmingham, for *John A. Behn, Twyford & Reece*, Liverpool).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[2 W.L.R. 1**

COURT OF CRIMINAL APPEAL

FALSIFICATION OF ACCOUNTS: WHETHER INTENT TO AVOID DISMISSAL INTENT TO DEFRAUD

R. *v.* Wines

Lord Goddard, C.J., Byrne and Parker, JJ. 31st March, 1953

Appeal against conviction.

The appellant, a departmental manager of a store, was charged with the larceny as a servant of goods from his department and with falsification of accounts. The appellant denied larceny and said in evidence that he had falsified the accounts to show a greater profit from his department than had actually been made because he was afraid that if he showed the real profit he would be dismissed. The prosecution alleged that he had falsified the accounts in order to cover up the thefts. The Recorder directed the jury that whichever version as to the object of the falsification they accepted there was an intent to defraud and the charge was made out. The appellant was convicted on all counts and appealed on the ground of misdirection.

LORD GODDARD, C.J., said there was no ground for disturbing the conviction as to the larceny and the only difficulty was whether the Recorder's direction on falsification of accounts were right. The offence was committed if the falsification was done with intent to defraud. Applying the well-known definition by Buckley, J., in *In re London and Globe Finance Corporation, Ltd.* [1903] 1 Ch. 728, 332, of the difference between an intent to deceive and an intent to defraud, what had to be considered was whether the deceit which had been practised had merely induced, or was intended merely to induce, a state of mind, or whether it induced a course of action. If the appellant's object really was what he said it was, his employers by his falsification would have been induced to retain him in their service, and he would have been getting wages from them by means of a false representation, that was to say, by the falsification of the accounts. That did, in the circumstances, amount to an intent to defraud, and the direction was right. Appeal dismissed.

APPEARANCES: *Leo Clark* (*Registrar, Court of Criminal Appeal*); *R. G. Micklethwait* (*H. J. Astley*, Oxford).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 64**

SURVEY OF THE WEEK

ROYAL ASSENT

The following Bills received the Royal Assent on 18th December:—

Air Corporations
Armed Forces (Housing Loans)
Consolidated Fund (No. 3)
Electoral Registers
Expiring Laws Continuance
Glasgow Corporation (Water, &c.) Order Confirmation
Inverness Harbour Order Confirmation
Post Office and Telegraph (Money)
Public Works Loans
Statute Law Revision

HOUSE OF LORDS

DEBATES

JURIES AND CAPITAL PUNISHMENT

VISCOUNT SIMON rose to call attention to the Report of the Royal Commission on Capital Punishment and to move to resolve that in the opinion of the House it was not desirable to cast upon a jury which had convicted the accused of murder the further duty of answering questions which might determine his punishment. He thought it regrettable that the Royal Commission had not contained any member whose duty it had been to pass sentence of death. The Report thought there should be a discretion as to the sentence passed on proof of murder, and having decided that that task could not be put on the judge, said that the only alternative was to put it on the jury. A jury, a chance collection of twelve individuals, was an excellent tribunal of fact, but he thought it a most doubtful instrument for assessing punishment. It was to have an unfettered discretion to decide whether there were extenuating circumstances after considering all the information put before it as to antecedents, mental condition, etc. The decision would have to be unanimous, and there would be no necessity for the jury to give reasons. It would be binding on the judge. The alternative sentence would be life imprisonment in the usual sense of that term, i.e., indefinite imprisonment. The Report envisaged that a trial should take two parts: first, a decision on guilt, then a decision as to extenuating circumstances. Defending counsel would press for a finding of such circumstances, but there was to be no question of counsel for the prosecution "demanding the death penalty," for that, as the Commission had rightly recognised, would be intolerable. The judge would sum up as to whether or not there were extenuating circumstances. He was sorry to have to make this comment on the Report of a Commission whose members he knew and admired, but he did not think they had come to a wise conclusion.

EARL JOWITT said he did not agree with the Royal Commission's view that the matter could be left to the jury. The point should be faced squarely. It was not enough to say that in the past, by returning perverse verdicts, juries had forced the law into compliance with morality. He thought the scheme as proposed was absolutely unworkable. He did not agree with the Archbishop of Canterbury, who, unable to be present, had written to say that it was intolerable that the solemn procedure of the death sentence should continue to be enacted in the 50 per cent. of cases where a reprieve followed. The Home Office had certain guiding principles as to reprieves which avoided disparities of treatment: a jury would approach each case without any guiding body of precedent at all. This would bring the law into disrepute. Again, in applying to the Home Secretary, a man often produced successfully material quite at variance with his defence at the trial. His defence was a denial of the act; then he asked the Court of Criminal Appeal to find misdirection or insufficient evidence; if that failed he could go to the Home Secretary and say: I had an uncontrollable impulse—I was already being treated by a psychiatrist. On that new evidence the Home Secretary could decide to reprieve. But how was this type of matter going to be received by a jury in the proposed new type of trial? The whole pattern of defence procedure would be radically altered.

VISCOUNT TEMPLEWOOD, supporting the proposal of the Royal Commission, said it had carried out world-wide enquiries and found such a discretion in the jury worked quite satisfactorily in Belgium, South Africa, the United States, and elsewhere. The juries did not give emotional verdicts nor was there the great disparity which earlier speakers had feared. He thought that the prerogative of mercy should be preserved but supplemented by a power given to either judges or juries to take into account extenuating circumstances.

LORD GODDARD said that if the proposal were adopted juries would tend to return verdicts of manslaughter when there were extenuating circumstances in cases of clear murder. There was at present an increasing tendency for juries to disagree—which would also be exacerbated. He thought the Commission's proposal that if the jury disagreed on penalty the death sentence should be passed automatically was extraordinary. The procedure was to be that witnesses for the defence in the second part of the trial should not be subject to cross-examination; defence counsel and the judge would speak, but not apparently the prosecuting counsel. Rather than take part in such a performance as that he would resign the office he held, for he thought it would be destructive of everything in British law.

Replying to the debate, the LORD CHANCELLOR said he could make no pronouncement on behalf of the Government on the issues raised, though he thought the arguments would weigh heavily with the Government. [16th December.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time:—

Long Leases (Scotland) Bill [H.C.] [17th December.

To enable lessees and sub-lessees occupying residential property in Scotland under certain long leases to obtain a feu right of such property on certain conditions; to extend and amend the Registration of Leases (Scotland) Act, 1857; and for purposes connected with the matters aforesaid.

B. DEBATES

Mr. G. H. R. ROGERS raised the question of the policy in **selecting chairmen for London rent tribunals.** Members of

rent tribunals had to give decisions free from Governmental influence, yet were subject to arbitrary removal by the Government. They had no security of tenure. Allegations had been made concerning the quality of their work which they had had no chance of refuting. They ought to be able to feel secure unless they committed misconduct; otherwise responsible people would soon begin to refuse to serve on the tribunals. If they were not free from pressure a tribunal might avoid giving a decision which might result in an appeal to the High Court, in view of the well-known Ministerial reluctance to appeal. As regards the Hammersmith Rent Tribunal, after the Minister's unwillingness to appeal had been established there had been fifteen such appeals in less than three years. Not once did the Minister appeal. In the *Pickavance* case the decision to appeal to the House of Lords was entered with only six hours to spare—yet the decision was unanimous in favour of the tribunal. Now the flow of appeals had tapered off. Few things regarding rent tribunals had been more unfortunate than the pusillanimous attitude of the Ministry towards High Court cases and its downright lack of support for the tribunals, thus encouraging the wrong type of landlord to litigate with almost a guarantee of success.

In reply, Mr. MARPLES said the Hammersmith Rent Tribunal had lost eight cases in the High Court and in fact had lost more than any other tribunal. (In fact, there was no appeal from a rent tribunal, but the High Court could interfere where it appeared to have exceeded its jurisdiction or to have reached a decision wrong in law.) The next nearest was the Paddington Tribunal before it was split in two. He would look into any specific matters brought to his notice by Mr. Rogers.

[16th December.

C. QUESTIONS

OBSCENE BOOKS AND POSTCARDS

The HOME SECRETARY stated that publishing, exhibiting or selling any indecent or obscene book, writing, picture, or model, or any other indecent or obscene article or thing, constituted an indictable misdemeanour at common law, punishable on summary conviction by a fine of £100 or six months' imprisonment or both, and on indictment by such fine or imprisonment or both as the court in its discretion thought fit. He had no reason to think that these penalties were inadequate. [17th December.

R. *v.* CHRISTIE (COUNSEL'S FEES)

The ATTORNEY-GENERAL stated that the fees paid to counsel for the Crown in the case of *R.* v. *Christie* were £387 7s., of which £282 10s. was paid out of local funds. [18th December.

JUDGE'S CLERKS AND OFFICIAL REFEREES (PENSIONS)

The ATTORNEY-GENERAL said that the Government intended to introduce legislation during the present session to provide for payment of pensions to judge's clerks and to improve the pension terms of Official Referees. [18th December.

TIMOTHY JOHN EVANS (INQUIRY COSTS)

The HOME SECRETARY stated that no fee was paid to Mr. Scott Henderson, Q.C., for his report on the case of Timothy John Evans. [18th December.

POACHING PROSECUTIONS

The HOME SECRETARY said he understood that the proceedings against six men for poaching at Grindleton, West Riding, in which fines and penalties totalling £139 12s. were imposed, were instituted by the West Riding of Yorkshire County Council under s. 4 of the Game Licences Act, 1860, in the exercise of powers conferred by s. 6 of the Finance Act, 1908, and the Order in Council of 19th October, 1908 (S.R. & O., 1908, No. 844). [18th December.

STATUTORY INSTRUMENTS

Act of Sederunt (Court of Session Witnesses' Fees), 1953. (S.I. 1953 No. 1831 (S. 122).)

Act of Sederunt (Sheriff Court Witnesses' Fees), 1953. (S.I. 1953 No. 1832 (S. 123).)

Agricultural Statistics (England and Wales) Amendment Regulations, 1953. (S.I. 1953 No. 1867). 5d.

Argyle County Council (Allt Bocain) Water Order, 1953. (S.I. 1953 No. 1824 (S. 121).) 5d.

Cotton Waste Reclamation Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1953. (S.I. 1953 No. 1835.)

Export of Goods (Control) (Consolidation) Order, 1953 (Amendment No. 5) Order, 1953. (S.I. 1953 No. 1840.) 8d.

Family Allowances (Australia Reciprocal Arrangements) Regulations, 1953. (S.I. 1953 No. 1842.) 5d.

Fats and Cheese (Rationing) (Amendment No. 7) Order, 1953. (S.I. 1953 No. 1861.)

Food Standards (Soft Drinks) Order, 1953. (S.I. 1953 No. 1828). 6d.

Import Duties (Drawback) (No. 14) Order, 1953. (S.I. 1953 No. 1864.)

Import Duties (Drawback) (No. 15) Order, 1953. (S.I. 1953 No. 1865.)

Imported Canned Fish (Amendment) Order, 1953. (S.I. 1953 No. 1860.)

Local Government (Allowances to Members) (Prescribed Bodies) Regulations, 1953. (S.I. 1953 No. 1818.)

Magnesium Distribution (Revocation) Order, 1953. (S.I. 1953 No. 1850.)

Milk (Special Designations) (Pasteurised and Sterilised Milk) (Amendment) Regulations, 1953. (S.I. 1953 No. 1821.)

Milk (Special Designations) (Specified Areas) (No. 3) Order, 1953. (S.I. 1953 No. 1863.)

Milk (Special Designations) (Specified Areas) (Scotland) (No. 2) Order, 1953. (S.I. 1953 No. 1862.)

Milk and Dairies (Amendment) Regulations, 1953. (S.I. 1953 No. 1876.)

Motor Vehicles (Construction and Use) (Amendment) Regulations, 1953. (S.I. 1953 No. 1872.) 8d.

Motor Vehicles (Construction and Use) (Track Laying Vehicles) (Amendment) Regulations, 1953. (S.I. 1953 No. 1873.) 6d.

Nurses (Amendment No. 2) Rules, Approval Instrument, 1953. (S.I. 1953 No. 1837.)

Oils and Fats (No. 2) (Amendment No. 2) Order, 1953. (S.I. 1953 No. 1846.)

Petty Sessional Divisions (Bedfordshire) Order, 1953. (S.I. 1953 No. 1834.) 6d.

Petty Sessional Divisions (Nottinghamshire) Order, 1953. (S.I. 1953 No. 1847.) 6d.

Petty Sessional Divisions (Surrey) Order, 1953. (S.I. 1953 No. 1839.) 6d.

Police Pensions (Scotland) Regulations, 1953. (S.I. 1953 No. 1833 (S. 124).) 5d.

Draft **Prison** (Scotland) Rules, 1954.

Public Health (Preservatives, etc., in Food) (Scotland) Amendment (No. 2) Regulations, 1953. (S.I. 1953 No. 1859 (S. 125).) 5d.

Regulation of Traffic on Highways (Revocation) Order, 1953. (S.I. 1953 No. 1874.)

Retention of Cable under Highway (Staffordshire) (No. 4) Order, 1953. (S.I. 1953 No. 1844.)

Soft Drinks (Revocation) Order, 1953. (S.I. 1953 No. 1827.)

Stopping up of Highways (Glamorganshire) (No. 2) Order, 1953. (S.I. 1953 No. 1845.)

Stopping up of Highways (London) (No. 23) Order, 1953. (S.I. 1953 No. 1858.)

Superannuation (Teaching and Fire Service) Amending Rules, 1953. (S.I. 1953 No. 1871.) 5d.

Tin Box Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1953. (S.I. 1953 No. 1819.) 5d.

Trent River Board (Fisheries) Order, 1953. (S.I. 1953 No. 1822.)

Welland River Board Area (Eels and Elvers) Order, 1953. (S.I. 1953 No. 1823.)

Whaling Industry (Ship) Regulations, 1953. (S.I. 1953 No. 1838.) 8d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

THE UNION SOCIETY OF LONDON announce the following subjects for debate in January, 1954: Wednesday, 13th, "That this House deplores the methods of commercial advertisers"; Wednesday, 20th, "That France is no longer entitled to a seat among the great Powers"; and Wednesday, 27th, joint debate with the Sylvan Debating Club, "That this House affirms its confidence in the moral state of the nation." Meetings are held in the Common Room, Gray's Inn, at 8 p.m.

NOTES AND NEWS

Honours and Appointments

The Lord Chancellor has decided to appoint Mr. THOMAS MERCER BACKHOUSE to be a Judge of County Courts with effect from the 24th December, 1953, in the place of the late Judge Caporn as the Judge of Circuit 18 (Nottingham, Doncaster, etc.).

Mr. CLEMENT DAVIES, Q.C., M.P., has been elected a Bencher of the Honourable Society of Lincoln's Inn.

Mr. JOHN HOWARD DAVIES, deputy clerk, assistant solicitor, and Civil Defence officer of Frimley and Camberley Urban District Council, has been appointed clerk to Haslemere Urban District Council.

The Queen has been pleased to appoint Mr. HENRY ELAM to be deputy chairman of the Court of Quarter Sessions for the County of London as from 1st January, 1954, in succession to Mr. A. W. Cockburn.

Sir JAMES GRIGG and Sir FREDERICK GODBER have been elected honorary Masters of the Bench of the Middle Temple.

Mr. LIONEL KAYE, deputy town clerk of Bromley, has been appointed town clerk to succeed Mr. Stanley Critchley Auty, who has retired.

Mr. WILFRID PRICE has been elected Master Treasurer of the Middle Temple for 1954.

Mr. ROGER CHARLES FRIEND SERPELL, solicitor, of Plymouth, has been elected chairman of the management committee of Plymouth Arts Centre.

Mr. JAMES GILCHRIST SMITH, solicitor, of Middlesbrough, has been appointed deputy town clerk of Middlesbrough.

Personal Notes

On the retirement of Mr. J. Brock Allon from the office of town clerk of Wolverhampton (97 SOL. J. 881), the town council on 21st December passed a resolution of appreciation of the services rendered by him to Wolverhampton.

Miscellaneous

At The Law Society's Final Examination, held on 2nd, 3rd and 4th November, 1953, 189 candidates out of 415 were successful. The Council have awarded the John Mackrell Prize, value £15, to J. Black and J. M. Polden.

NETHERLANDS ASSETS IN UNITED KINGDOM

The Trading with the Enemy (Enemy Territory Cessation) (Netherlands) Order, 1953, which came into operation on 11th December, 1953, removes control exercised under the Trading with the Enemy Act, 1939, and Orders made thereunder, in respect of money and property which came under such control solely because the owners were resident in Netherlands and Netherlands New Guinea. It does not, without supplementary action, affect the position of such of the money and property as has been paid to or vested in a Custodian of Enemy Property, or has come under the control of an Administrator of Enemy Property.

Money and bank balances held by bankers and others to the order of a custodian in respect of Netherlands persons will be the subject of further instructions from the Custodian of Enemy Property. Bankers, company secretaries, registrars, and others concerned with the holding or managing of property or with the transfer of securities or other properties of persons in the Netherlands and Netherlands New Guinea should note that authority under Trading with the Enemy legislation for such activities is not now required in cases where there is no question of prior vesting in a Custodian of Enemy Property by general or specific order, or of control by an Administrator of Enemy Property.

Application for the release of such other Netherlands and Netherlands New Guinea property as is vested in the Custodian should be made to the Administration of Enemy Property Department (Branch 4), Lacon House, Theobalds Road, London, W.C.1, accompanied by a mandate authorising the Custodian to pay or transfer to a bank or other nominee in the United Kingdom. Any inquiries of a general nature about the effect of the order should also be made to the same address.

UNITED KINGDOM USE OF JAPANESE TRADE MARKS

The Board of Trade state that they have under consideration a number of questions relating to trade marks which were on the register on 8th December, 1941, in the names of Japanese persons or concerns, living or carrying on business in Japan.

Persons or concerns in the United Kingdom claiming to have a continuing interest in such trade marks arising out of their use since 8th December, 1941, in connection with goods manufactured in the United Kingdom are invited to communicate with the Registrar of Trade Marks, stating—

(*a*) the numbers (with short descriptions) of the Japanese registered trade marks [that they are using];

(*b*) the extent of their interests in those marks and the source of those interests;

(*c*) whether at 8th December, 1941, there existed any contract or agreement between them and the Japanese registered proprietors relating to the use of those marks;

(*d*) whether after 8th December, 1941, they exercised registered user rights in those marks, and, if so, for what period;

(*e*) what goods have been or are being manufactured under those marks, and the periods during which the goods were produced.

All communications arising out of this notice should be addressed to: The Registrar of Trade Marks (Japanese Marks), The Patent Office, 25 Southampton Buildings, London, W.C.2, and should reach him not later than 27th February, 1954.

SOCIETIES

At the annual meeting of DERBY LAW SOCIETY, Mr. R. S. D. Cash was installed as president. He is the third member of his family to hold the office.

At the 126th annual general meeting of the INCORPORATED LAW SOCIETY OF LIVERPOOL, held on 16th December, the following were elected to serve on the Committee for the ensuing three years: Messrs. A. W. Brown, A. S. Cawson, J. E. Hadfield, G. P. Harris, J. D. Kewish, G. C. Lees, T. B. Roberts, E. S. Russell and L. E. Rutherford.

The President (Mr. W. C. Crocker) and Council of THE LAW SOCIETY held a dinner at their Hall on the 17th December. Among those present were: the High Commissioner for Canada, the Bishop of London, Lord Porter, Lord Reid, Lord Justice Hodson, Lord Justice Denning, Sir Travers Humphreys, Mr. Justice Harman, Mr. Justice Cassels, Mr. Justice Danckwerts, Mr. Justice Barry, Mr. Justice Collingwood, Sir Leonard Holmes, Sir Geoffrey Collins, Sir Harry Pritchard, Sir Dingwall Bateson, Sir Edward McTiernan, Sir Lionel Heald, Q.C., M.P., Sir Randle Holme, Sir Alan Ellis, Q.C., Sir Kenneth Roberts-Wray, Sir Edwin Herbert, Sir Edward Wilshaw, Mr. C. A. M. Hallenborg, Professor H. H. Monteath, Mr. F. H. Jessop and Mr. W. Charles Norton.

The UNITED LAW SOCIETY announce the following debates for January, 1954: 11th, Commander C. B. Fry will open the debate "That classics is a more important subject than cricket" and will be opposed by Mr. H. H. Maddocks; 18th, parliamentary debate (with the Solicitors' Articled Clerks' Society) on the Second Reading of the Divorce by Consent (Magistrates' Court) Bill; 25th, "That in the opinion of this House *Foakes* v. *Beer* (1884), 9 App. Cas. 605, should no longer be followed."

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